

DCN 13630

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: **3 0 5 _ 0 6 4 0**

JUDGE ECHOLS

TO: (Name and address of Defendant)

JAMES H. BILBRAY, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2009

CLERK

DATE

(By) DEPUTY CLERK

Angie Brauer

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date_____
*Signature of Server*_____
Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:56

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

No. 3:05-cv-00000

JUDGE EMMONS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

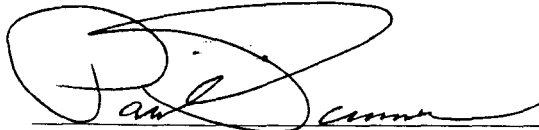
60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

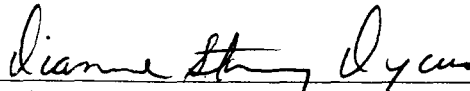
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)

Deputy Attorney General
General Civil Division
State of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredezen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, § 2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded.”⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission’s recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that “in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.”⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See *Perpich v. Department of Defense*, 496 U.S. 334 (1990); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (*Steel Seizures*).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
DIVISION

FILED

PHIL BREDESEN

2005 AUG 18 PM 2:32

v

) No 3:05-0640

DONALD RUMSFIELD, ETAL

) Judge Echols/Brown

NOTICE OF SETTING OF INITIAL CASE MANAGEMENT CONFERENCE

Pursuant to Local Rule 11, effective January 1, 2001, notice is hereby given that the initial case management conference is scheduled before Magistrate Judge Brown, Courtroom 776, U.S. Courthouse, 801 Broadway, Nashville, TN, at 10:00 AM on October 17, 2005.

LEAD TRIAL COUNSEL FOR EACH PARTY who has been served and who has received this notice is required to attend the initial case management conference, unless otherwise ordered by the case management Judge. Appearance by counsel at the initial case management conference will not be deemed to waive any defenses to personal jurisdiction. Counsel are advised to bring their calendars with them to the conference for the purpose of scheduling future dates. Counsel for the filing party is also advised to notify the courtroom deputy for the Judge before whom the conference is scheduled, if none of the defendants has been served prior to the scheduled conference date.

Pursuant to Local Rule 11(d), counsel for all parties shall, at the initiative of the plaintiff's counsel, confer prior to the initial case management conference as required by Fed.R.Civ.P. 26(f), to discuss the issues enumerated in Local Rule 11(d)(1)(b) and (c) and Local Rule 11(d)(2), and to determine if any issues can be resolved by agreement subject to the Court's approval. Pursuant to Local Rule 11(d)(1)b.2, counsel for all parties shall, at the initiative of plaintiff's counsel, prepare a proposed case management order that encompasses the discovery plan required by Fed.R.Civ.P. 26(f), the pertinent issues listed in section (d)(1)c and section (d)(2), and any issues that can be resolved by agreement. **The proposed case management order shall be filed with the Court THREE (3) business days before the initial case management conference. If the proposed order CANNOT be filed on time, PLAINTIFF'S COUNSEL is responsible for contacting the Magistrate Judge's office to reschedule the conference. FAILURE to obtain service on all defendants should be called to the Magistrate Judge's attention. FAILURE TO FILE THE PROPOSED ORDER WITHOUT CONTACTING THE MAGISTRATE JUDGE'S OFFICE CAN RESULT IN SANCTIONS.**

Effective December 1, 2000, Fed.R.Civ.P. 26(a)(1) regarding required initial disclosures applies.

PURSUANT TO LOCAL RULE 11(d)(1), COUNSEL FOR THE PARTY FILING THIS LAWSUIT MUST SERVE A COPY OF THIS NOTICE ON THE OTHER PARTIES TO THIS LAWSUIT, ALONG WITH THE SUMMONS AND COMPLAINT OR WITH THE REQUEST FOR WAIVER OF SERVICE UNDER FED.R.CIV.P. 4(d), OR WITH THE SERVICE COPY OF THE NOTICE OF REMOVAL.

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER:

3 05 - 0340

JUDGE ECHOLS

TO: (Name and address of Defendant)

PHILLIP E. COYLE, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

ERK

DATE

Ange Brewer

(By) DEPUTY CLERK

SERVICE COPY

RETURN OF SERVICE

Service of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served:

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

Name of person with whom the summons and complaint were left:

☐ Returned unexecuted:

☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

\$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE MAGISTRATE JUDGE.

v. ,
Plaintiff) No.

) District Judge Echols
)
Defendant) Magistrate Judge Brown

Pursuant to 28 U.S.C. § 636(c), Rule 73(b) of the Federal Rules of Civil Procedure, and Local Rule 301 of the Local Rules for Magistrate Proceedings,

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

Any appeal shall be to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c).

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

If necessary, attach an additional page with additional signatures of counsel or parties.

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

SUMMONS IN A CIVIL ACTION

CASE NUMBER: **3 0 5 - 0 6 4 0**
JUDGE ECHOLS

TO: (Name and address of Defendant)

HAROLD W. GEHMAN, JR., Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

CLERK

DATE

(By) DEPUTY CLERK

Angie Brauer

SERVICE COPY

RETURN OF SERVICE

Service of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (PRINT)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
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CASE NO.: 3:05-0640

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If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

**DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT
TO PROCEED BEFORE THE MAGISTRATE JUDGE.**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

No. 3 05 1046

JUDGE [REDACTED]

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

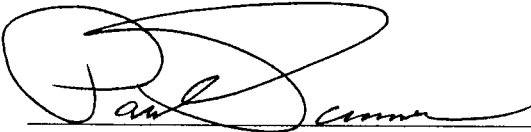
60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

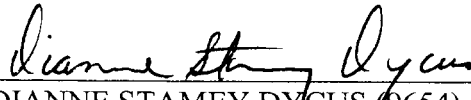
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)

Deputy Attorney General
General Civil Division
State of Tennessee
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(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredeesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div. B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div. A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div. A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div. B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div. A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div. A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

- (1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.
 - (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.
 - (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.
 - (4) The cost of operations and the manpower implications.
- (c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:
- (1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.
 - (2) The economic impact on existing communities in the vicinity of military installations.
 - (3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.
 - (4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.
- (d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.
- (e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.
- (f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER:

3 08 0000

JUDGE ECHOLS

TO: (Name and address of Defendant)

JAMES V. HANSEN, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

CLERK

Angie Brewer

(By) DEPUTY CLERK

DATE

AUG 18 2005

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date_____
*Signature of Server*_____
Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

**DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT
TO PROCEED BEFORE THE MAGISTRATE JUDGE.**

V.

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

No. 3 05-1

JUDGE FOWLER

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredezen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredezen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredezen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredezen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

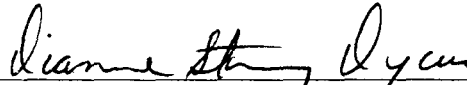
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)

Deputy Attorney General
General Civil Division
State of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

- (1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.
- (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.
- (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.
- (4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

- (1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.
- (2) The economic impact on existing communities in the vicinity of military installations.
- (3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.
- (4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.
- (d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.
- (e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.
- (f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel

Approved: David Hague, General Counsel

DL 14 Jul 05

DH 14 Jul 05

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
DIVISION

FILED

PHIL BREDESEN

2005 AUG 18 PM 2:32

v

No. 3:05-0640

DONALD RUMSFIELD, ETAL

Judge Echols/Brown

NOTICE OF SETTING OF INITIAL CASE MANAGEMENT CONFERENCE

Pursuant to Local Rule 11, effective January 1, 2001, notice is hereby given that the initial case management conference is scheduled before Magistrate Judge Brown, Courtroom 776, U.S. Courthouse, 801 Broadway, Nashville, TN, at 10:00 AM on October 17, 2005.

LEAD TRIAL COUNSEL FOR EACH PARTY who has been served and who has received this notice is required to attend the initial case management conference, unless otherwise ordered by the case management Judge. Appearance by counsel at the initial case management conference will not be deemed to waive any defenses to personal jurisdiction. Counsel are advised to bring their calendars with them to the conference for the purpose of scheduling future dates. Counsel for the filing party is also advised to notify the courtroom deputy for the Judge before whom the conference is scheduled, if none of the defendants has been served prior to the scheduled conference date.

Pursuant to Local Rule 11(d), counsel for all parties shall, at the initiative of the plaintiff's counsel, confer prior to the initial case management conference as required by Fed.R.Civ.P. 26(f), to discuss the issues enumerated in Local Rule 11(d)(1)(b) and (c) and Local Rule 11(d)(2), and to determine if any issues can be resolved by agreement subject to the Court's approval. Pursuant to Local Rule 11(d)(1)b.2, counsel for all parties shall, at the initiative of plaintiff's counsel, prepare a proposed case management order that encompasses the discovery plan required by Fed.R.Civ.P. 26(f), the pertinent issues listed in section (d)(1)c and section (d)(2), and any issues that can be resolved by agreement. **The proposed case management order shall be filed with the Court THREE (3) business days before the initial case management conference. If the proposed order CANNOT be filed on time, PLAINTIFF'S COUNSEL is responsible for contacting the Magistrate Judge's office to reschedule the conference. FAILURE to obtain service on all defendants should be called to the Magistrate Judge's attention. FAILURE TO FILE THE PROPOSED ORDER WITHOUT CONTACTING THE MAGISTRATE JUDGE'S OFFICE CAN RESULT IN SANCTIONS.**

Effective December 1, 2000, Fed.R.Civ.P. 26(a)(1) regarding required initial disclosures applies.

PURSUANT TO LOCAL RULE 11(d)(1), COUNSEL FOR THE PARTY FILING THIS LAWSUIT MUST SERVE A COPY OF THIS NOTICE ON THE OTHER PARTIES TO THIS LAWSUIT, ALONG WITH THE SUMMONS AND COMPLAINT OR WITH THE REQUEST FOR WAIVER OF SERVICE UNDER FED.R.CIV.P. 4(d), OR WITH THE SERVICE COPY OF THE NOTICE OF REMOVAL.

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER: 3 03 6340

JUDGE ECHOLS

TO: (Name and address of Defendant)

JAMES T. HILL, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

CLERK

Angie Brewer

(By) DEPUTY CLERK

DATE

SERVICE COPY

RETURN OF SERVICE

Service of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE MAGISTRATE JUDGE.

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

No. 3 05 0740

JUDGE SCHOLTS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

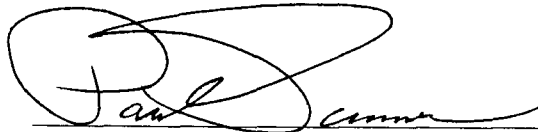
60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

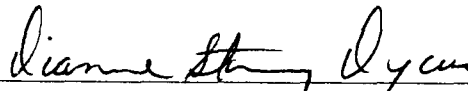
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



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Attorney General
State of Tennessee



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STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See *Perpich v. Department of Defense*, 496 U.S. 334 (1990); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (*Steel Seizures*).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See *Steel Seizures*; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
DIVISION

FILED

PHIL BREDESEN

2005 AUG 18 PM 2:32

v

No. 3:05-0640

DONALD RUMSFIELD, ETAL

Judge Echols/Brown

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

NOTICE OF SETTING OF INITIAL CASE MANAGEMENT CONFERENCE

Pursuant to Local Rule 11, effective January 1, 2001, notice is hereby given that the initial case management conference is scheduled before Magistrate Judge Brown, Courtroom 776, U.S. Courthouse, 801 Broadway, Nashville, TN, at 10:00 AM on October 17, 2005.

LEAD TRIAL COUNSEL FOR EACH PARTY who has been served and who has received this notice is required to attend the initial case management conference, unless otherwise ordered by the case management Judge. Appearance by counsel at the initial case management conference will not be deemed to waive any defenses to personal jurisdiction. Counsel are advised to bring their calendars with them to the conference for the purpose of scheduling future dates. Counsel for the filing party is also advised to notify the courtroom deputy for the Judge before whom the conference is scheduled, if none of the defendants has been served prior to the scheduled conference date.

Pursuant to Local Rule 11(d), counsel for all parties shall, at the initiative of the plaintiff's counsel, confer prior to the initial case management conference as required by Fed.R.Civ.P. 26(f), to discuss the issues enumerated in Local Rule 11(d)(1)(b) and (c) and Local Rule 11(d)(2), and to determine if any issues can be resolved by agreement subject to the Court's approval. Pursuant to Local Rule 11(d)(1)b.2, counsel for all parties shall, at the initiative of plaintiff's counsel, prepare a proposed case management order that encompasses the discovery plan required by Fed.R.Civ.P. 26(f), the pertinent issues listed in section (d)(1)c and section (d)(2), and any issues that can be resolved by agreement. **The proposed case management order shall be filed with the Court THREE (3) business days before the initial case management conference. If the proposed order CANNOT be filed on time, PLAINTIFF'S COUNSEL is responsible for contacting the Magistrate Judge's office to reschedule the conference. FAILURE to obtain service on all defendants should be called to the Magistrate Judge's attention. FAILURE TO FILE THE PROPOSED ORDER WITHOUT CONTACTING THE MAGISTRATE JUDGE'S OFFICE CAN RESULT IN SANCTIONS.**

Effective December 1, 2000, Fed.R.Civ.P. 26(a)(1) regarding required initial disclosures applies.

PURSUANT TO LOCAL RULE 11(d)(1), COUNSEL FOR THE PARTY FILING THIS LAWSUIT MUST SERVE A COPY OF THIS NOTICE ON THE OTHER PARTIES TO THIS LAWSUIT, ALONG WITH THE SUMMONS AND COMPLAINT OR WITH THE REQUEST FOR WAIVER OF SERVICE UNDER FED.R.CIV.P. 4(d), OR WITH THE SERVICE COPY OF THE NOTICE OF REMOVAL.

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER: **3 05 00 4 0**

JUDGE ECHOLS

TO: (Name and address of Defendant)

LLOYD W. NEWTON, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

CLERK

DATE

(By) DEPUTY CLERK

Angie Brewer

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

\$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE MAGISTRATE JUDGE.

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Defendant/Defendant



DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

No. 3 05 0040

JUDGE ECHOLS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

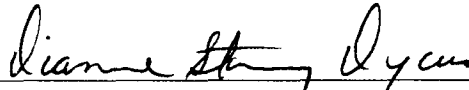
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)

Deputy Attorney General
General Civil Division
State of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

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² Pub. L. No. 101-510, Div. B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div. A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div. A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div. B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div. A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div. A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See *Perpich v. Department of Defense*, 496 U.S. 334 (1990); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (*Steel Seizures*).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

- (1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.
- (2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.
- (3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
DIVISION

FILED

PHIL BREDESEN

2005 AUG 18 PM 2:32

v

No 3:05-0640

DONALD RUMSFIELD, ETAL

Judge Echols/Brown

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

NOTICE OF SETTING OF INITIAL CASE MANAGEMENT CONFERENCE

Pursuant to Local Rule 11, effective January 1, 2001, notice is hereby given that the initial case management conference is scheduled before Magistrate Judge Brown, Courtroom 776, U.S. Courthouse, 801 Broadway, Nashville, TN, at 10:00 AM on October 17, 2005.

LEAD TRIAL COUNSEL FOR EACH PARTY who has been served and who has received this notice is required to attend the initial case management conference, unless otherwise ordered by the case management Judge. Appearance by counsel at the initial case management conference will not be deemed to waive any defenses to personal jurisdiction. Counsel are advised to bring their calendars with them to the conference for the purpose of scheduling future dates. Counsel for the filing party is also advised to notify the courtroom deputy for the Judge before whom the conference is scheduled, if none of the defendants has been served prior to the scheduled conference date.

Pursuant to Local Rule 11(d), counsel for all parties shall, at the initiative of the plaintiff's counsel, confer prior to the initial case management conference as required by Fed.R.Civ.P. 26(f), to discuss the issues enumerated in Local Rule 11(d)(1)(b) and (c) and Local Rule 11(d)(2), and to determine if any issues can be resolved by agreement subject to the Court's approval. Pursuant to Local Rule 11(d)(1)b.2, counsel for all parties shall, at the initiative of plaintiff's counsel, prepare a proposed case management order that encompasses the discovery plan required by Fed.R.Civ.P. 26(f), the pertinent issues listed in section (d)(1)c and section (d)(2), and any issues that can be resolved by agreement. **The proposed case management order shall be filed with the Court THREE (3) business days before the initial case management conference. If the proposed order CANNOT be filed on time, PLAINTIFF'S COUNSEL is responsible for contacting the Magistrate Judge's office to reschedule the conference. FAILURE to obtain service on all defendants should be called to the Magistrate Judge's attention. FAILURE TO FILE THE PROPOSED ORDER WITHOUT CONTACTING THE MAGISTRATE JUDGE'S OFFICE CAN RESULT IN SANCTIONS.**

Effective December 1, 2000, Fed.R.Civ.P. 26(a)(1) regarding required initial disclosures applies.

PURSUANT TO LOCAL RULE 11(d)(1), COUNSEL FOR THE PARTY FILING THIS LAWSUIT MUST SERVE A COPY OF THIS NOTICE ON THE OTHER PARTIES TO THIS LAWSUIT, ALONG WITH THE SUMMONS AND COMPLAINT OR WITH THE REQUEST FOR WAIVER OF SERVICE UNDER FED.R.CIV.P. 4(d), OR WITH THE SERVICE COPY OF THE NOTICE OF REMOVAL.

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER: **3 0 5 - 0 6 4 0**

JUDGE RUSTON

TO: (Name and address of Defendant)

ANTHONY J. PRINCIPI, Chairman
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

ERK

Angie Brewer

DATE

(By) DEPUTY CLERK

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

**DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT
TO PROCEED BEFORE THE MAGISTRATE JUDGE.**



DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:56

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

No. 3 03-6640

JUDGE ECHOLS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredeesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredeesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredeesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredeesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.


60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

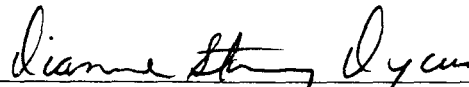
A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)
Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)
Deputy Attorney General
General Civil Division
State of Tennessee
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(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign and installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign and installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, § 2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded.”⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an “organization of the National Guard whose members have received compensation from the United States as members of the National Guard,” the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission’s recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that “in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times.”⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Perpich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC §104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

2005 AUG 18 PM 2-32

DISCUSSION

) No.3:05-0640

) Judge Echols/Brown

CLERK'S OFFICE

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER: 3 0 5 - 0 0 4 0

JUDGE ECHOLS

TO: (Name and address of Defendant)

SAMUEL K. SKINNER, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

CLERK

Gingie Brewer

(By) DEPUTY CLERK

DATE

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

\$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on

Date

Signature of Server

Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05
FROM: CLERK OF COURT
RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL
CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

**DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT
TO PROCEED BEFORE THE MAGISTRATE JUDGE.**

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

Attorney for Defendant/Defendant

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

No. 3 45 00 40

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

JUDGE ECHOLS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §§18235(b)(1)

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

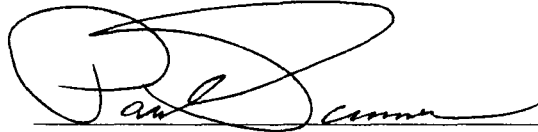
60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

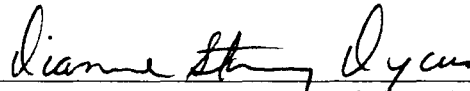
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



DIANNE STAMEY DYCUS (9654)

Deputy Attorney General
General Civil Division
State of Tennessee
P.O. Box 20207
Nashville, TN 37202
(615) 741-6420

STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredeesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

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² Pub. L. No. 101-510, Div. B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div. A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div. A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div. B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div. A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div. A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See Pernich v. Department of Defense, 496 U.S. 334 (1990); see generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizures).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See *Steel Seizures*; W. Winthrop, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

Author: Dan Cowhig, Deputy General Counsel *DC 14 Jul 05*
Approved: David Hague, General Counsel *DH 14 Jul 05*

4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

UNITED STATES DISTRICT COURT

MIDDLE

District of

TENNESSEE

PHIL BREDESEN, Governor of the State of
Tennessee,

SUMMONS IN A CIVIL ACTION

V.

DONALD H. RUMSFELD, Secretary of Defense
of the United States, et al.

CASE NUMBER:

3 03-0000

JUDGE ECHOLS

TO: (Name and address of Defendant)

SUE ELLEN TURNER, Member
Defense Base Closure & Realignment Commission
2521 South Clark Street, Suite 600
Arlington, VA 22202

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DIANNE STAMEY DYCUS
Deputy Attorney General
Tennessee Attorney General's Office
General Civil Division
P.O. Box 20207
Nashville, TN 37202
Phone: (615) 741-6420

an answer to the complaint which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

AUG 18 2005

CLERK

DATE

(By) DEPUTY CLERK

Angie Brewer

SERVICE COPY

RETURN OF SERVICEService of the Summons and complaint was made by me⁽¹⁾

DATE

NAME OF SERVER (*PRINT*)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served:
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left:
- ☐ Returned unexecuted:
- ☐ Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL \$0.00

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date_____
*Signature of Server*_____
Address of Server

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: 08/18/05

FROM: CLERK OF COURT

RE: PHIL BREDESEN V. DONALD H. RUMSFELD, ETAL

CASE NO.: 3:05-0640

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
DIVISION

v.

Plaintiff

Defendant

)
)
) No.
)
) District Judge Echols
)
) Magistrate Judge Brown

CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), Rule 73(b) of the Federal Rules of Civil Procedure, and Local Rule 301 of the Local Rules for Magistrate Proceedings,

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

Any appeal shall be to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c).

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

If necessary, attach an additional page with additional signatures of counsel or parties.

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

2005 AUG 18 PM 1:57

U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

PHIL BREDESEN, Governor of the
State of Tennessee,

Plaintiff,

-vs-

DONALD H. RUMSFELD, Secretary of Defense
of the United States; ANTHONY J. PRINCIPI,
Chairman of the Defense Base Closure and
Realignment Commission; JAMES H.
BILBRAY; PHILLIP E. COYLE; HAROLD W.
GEHMAN, JR.; JAMES V. HANSEN;
JAMES T. HILL; LLOYD W. NEWTON;
SAMUEL K. SKINNER; and SUE ELLEN
TURNER, members of the Defense Base
Closure and Realignment Commission,

Defendants.

No. **3 05 - 0640**

JAMES ECHOLS

COMPLAINT

Plaintiff, PHIL BREDESEN, in his official capacity as Governor of the State of Tennessee, by and through his attorney, Paul G. Summers, Attorney General of the State of Tennessee, submits the following complaint against the defendants, DONALD H. RUMSFELD, in his official capacity as Secretary of Defense of the United States; ANTHONY J. PRINCIPI, in his official capacity as Chairman of the Defense Base Closure and Realignment Commission; JAMES H. BILBRAY; PHILLIP E. COYLE; HAROLD W. GEHMAN, JR.; JAMES V.

HANSEN; JAMES T. HILL; LLOYD W. NEWTON; SAMUEL K. SKINNER; and SUE ELLEN TURNER, in their official capacities as members of the Defense Base Closure and Realignment Commission, as follows:

Nature of This Action

1. This action arises out of the Department of Defense's ("the Department") attempt, unilaterally and without seeking or obtaining the approval of the Governor of the State of Tennessee, to realign the 118th Airlift Wing of the Tennessee Air National Guard stationed in Nashville, Tennessee. The Department's attempt to realign the 118th Airlift Wing without first obtaining Governor Bredesen's approval violates federal law, which expressly grants rights to the State of Tennessee and its Governor, as commander-in-chief of the Tennessee National Guard. While this action arises in the context of the 2005 Base Realignment and Closing process, plaintiff does not challenge the validity of the Defense Base Closure and Realignment Act of 1990, as amended, codified at 10 U.S.C. §2687 note (the "BRAC Act"). Rather, plaintiff asserts that Secretary Rumsfeld has acted in excess of his statutory authority under the BRAC Act; that Secretary Rumsfeld has derogated rights granted by Congress to Governor Bredesen independent of the BRAC Act; and that Secretary Rumsfeld's action violates Article 1, §8 and Amend. II of the United States Constitution.

Parties

2. Plaintiff, Phil Bredesen, is the Governor of the State of Tennessee. Pursuant to the Constitution and laws of the State of Tennessee, plaintiff is the Commander in Chief of the

military forces of the State of Tennessee, except for those persons who are actively in the service of the United States.

3. Defendant Donald H. Rumsfeld is the Secretary of Defense of the United States. Pursuant to the Defense Base Closure and Realignment Act of 1990, as amended, Secretary Rumsfeld is authorized to make recommendations for the closure and realignment of federal military bases in the United States to the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

4. Defendant Anthony J. Principi has been named by the President of the United States to be Chairman of the Defense Base Closure and Realignment Commission. He is sued in his official capacity only.

5. Defendants James H. Bilbray; Phillip E. Coyle; Harold W. Gehman, Jr.; James V. Hansen; James T. Hill; Lloyd W. Newton; Samuel K. Skinner; and Sue Ellen Turner have been named by the President of the United States to be members of the Defense Base Closure and Realignment Commission. They are sued in their official capacities only.

6. The members of the Base Closure and Realignment Commission have interests which could be affected by the outcome of this litigation and are made defendants pursuant to Rule 19(a) of the Federal Rules of Civil Procedure.

Jurisdiction and Venue

7. This is a declaratory judgment action pursuant to 28 U.S.C. §§2201, 2202, and Fed.R.Civ.P. 57, which involves the interpretation of provisions of the United States Constitution (art. 1, §8 and Amend. II) and federal statutes (10 U.S.C. §2687 note; 10 U.S.C. §18235(b)(1))

and 18238; and 32 U.S.C. §104). This Court has jurisdiction pursuant to 28 U.S.C. §1331 because it arises under the laws of the United States.

8. Venue is proper in the Middle District of Tennessee by virtue of the fact that the Nashville International Airport Air Guard Station where the 118th Airlift Wing is based is in the Middle District of Tennessee and by virtue of the fact that the official residence of the Governor of the State of Tennessee is in the Middle District of Tennessee.

Factual Background

9. Pursuant to Sections 2903 and 2914 of the Defense Base Closure and Realignment Act of 1990 as amended, the Defense Base Closure and Realignment Commission is empowered to consider the recommendations of the Secretary of Defense and make recommendations to the President of the United States for the closure and realignment of military bases.

10. Pursuant to Sections 2903 and 2904 of the Defense Base Closure and Realignment Act of 1990 as amended, the Secretary of Defense of the United States shall close the bases recommended for closure by the Commission and realign the bases recommended for realignment, unless the recommendation of the Defense Base Closure and Realignment Commission is rejected by the President of the United States or disapproved by a joint resolution of Congress.

11. The purpose of the BRAC Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense.

12. The BRAC Act creates criteria for use in identifying military installations for closure or realignment. Pursuant to Section 2910, "realignment" is defined by the Act to include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances."

13. On May 13, 2005, Defendant Rumsfeld recommended to the Base Closure and Reassignment Commission realignment of the Tennessee Air National Guard's 118th Airlift Wing and relocation of eight C130 aircraft to different Air National Guard Units based in Louisville, Kentucky and Peoria, Illinois.

14. The 118th Airlift Wing is an operational flying National Guard Unit located entirely within the State of Tennessee at the Nashville International Airport Air Guard Station in Nashville, Tennessee.

15. There are currently one thousand two hundred twenty-seven (1,227) military and civilian positions allotted to the 118th Airlift Wing.

16. The 118th Airlift Wing personnel consists of sixty-five (65) Active Guard and Reserve personnel, two hundred twenty-six (226) military technicians, and nine hundred thirty-six (936) part-time guard members. Under the recommendation of Secretary Rumsfeld, seven hundred two (702) total personnel will be lost by the Tennessee Air National Guard consisting of nineteen (19) Active Guard and Reserve, one hundred seventy-two (172) military technicians, and five hundred eleven (511) traditional part-time guard positions.

17. The realignment of the 118th Airlift Wing in Nashville will also deprive the State of the ability to Airlift civil support teams from Nashville to areas throughout the State which

may be in danger from a chemical, nuclear, or biological accident or incident. Removal of these aircraft makes the State vulnerable in its ability to respond to a terrorist attack, and would severely affect Tennessee's Homeland Security.

18. The seven hundred two (702) total personnel that would be lost under the BRAC recommendation include the Aero Med Squadron, AES, or Aero Medical Evacuation Squadron, the only deployable medical capability in the Tennessee Air National Guard. The AES would be relocated to Carswell Air Force Base in Texas. The relocation of the Aero Medical Evacuation Squadron would severely reduce Tennessee's Homeland Security response capabilities.

19. The 118th Airlift Wing plays a key role in disaster and emergency response and recovery in Tennessee, particularly as it relates to planning for major disasters such as earthquake activity along the New Madrid Fault which runs through West Tennessee to include the city of Memphis.

20. The Air National Guard Base in Nashville is central to five (5) FEMA regions and is a key element in the potential activation of the Emergency Management Assistance Compact entered into by all fifty states and ratified by Congress.

21. During Operation Noble Eagle from September 11, 2001, until October 2002, the 118th Airlift Wing was one of only three such units selected to support critical Quick Reaction Force (QRF) and Ready Reaction Force (RRF) missions, and was identified as a Weapons of Mass Destruction (WMD) first responder Airlift Support Wing. Relocating the 118th Airlift Wing would deprive the State of Tennessee of these critical Homeland Security functions.

22. The one thousand two hundred twenty-six, (1,226) positions assigned to the 118th Airlift Wing constitute a well trained, mission ready state military force available to Governor

Bredesen to perform State Active Duty Missions dealing with homeland security, natural disasters and other State missions.

23. Realignment of the 118th Airlift Wing will deprive the Governor of nearly one-third of the total strength of the Tennessee Air National Guard and will reduce the strength of Tennessee military forces in the Middle Tennessee region.

24. Deactivation of the 118th Airlift Wing in Nashville, Tennessee will deprive the Governor and the State of Tennessee of a key unit and joint base of operations possessing current and future military capabilities to address homeland security missions in Tennessee and the southeastern United States.

25. In May 2005 and at all times subsequent to Secretary Rumsfeld's transmittal of the BRAC Report to the BRAC Commission, an overwhelming majority of the 118th Airlift Wing was not and currently is not in active federal service.

26. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

27. At no time during the 2005 BRAC process did any authorized representative of the Department request or obtain the approval of Governor Bredesen or his authorized representatives to change the branch, organization or allotment of the 118th Airlift Wing.

28. At no time during the 2005 BRAC process did Secretary Rumsfeld request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

29. At no time during the 2005 BRAC process did any authorized representative of the Department of Defense request or obtain the consent of Governor Bredesen or his authorized representatives to relocate or realign the 118th Airlift Wing.

30. If requested, Governor Bredesen would not give his approval to relocate, withdraw, deactivate, realign, or change the branch, organization or allotment of the 118th Airlift Wing.

31. By letter dated August 5, 2005, Governor Bredesen wrote to Secretary Rumsfeld stating that he did not consent to the deactivation, realignment, relocation, or withdrawal of the 118th Airlift Wing. See Exhibit A.

32. To date, neither Secretary Rumsfeld nor any authorized representative of the Department have responded to Governor Bredesen's letter dated August 5, 2005.

33. The Tennessee National Guard constitutes a portion of the reserve component of the armed forces of the United States.

34. The Air National Guard base at the Nashville International Airport Air Guard Station is used for the administering and training of the air reserve component of the armed forces.

35. The Office of the General Counsel for the Defense Base Closure and Realignment Commission has issued a legal opinion questioning the legality of the recommendations of Secretary Rumsfeld regarding the closure and realignment of certain National Guard units, including the recommendations regarding the realignment of the 118th Airlift Wing. See Exhibit B.

36. Pursuant to 32 U.S.C. §104(a) each State may fix the locations of the units and headquarters of its National Guard.

37. Federal law prohibits defendant Rumsfeld from taking action to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee.

38. By virtue of defendant Rumsfeld's proposal to realign the 118th Airlift Wing without the consent of the Governor of the State of Tennessee an actual controversy exists between the parties.

First Claim for Relief

39. Plaintiff incorporates by reference and realleges paragraphs 1 through 38, inclusive, as though fully set forth herein.

40. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to move aircraft from the Tennessee National Guard to a unit of the National Guard in another state.

41. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to determine how a National Guard unit is equipped or organized.

42. Secretary Rumsfeld exceeded his statutory authority under the BRAC Act by inappropriately using the Act as a basis to relocate, withdraw, disband or change the organization of the Tennessee Air National Guard.

43. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, under the authority of the BRAC Act,

realign the 118th Airlift Wing.

44. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Second Claim for Relief

45. Plaintiff incorporates by reference and realleges paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. Pursuant to 32 U.S.C. §104, no change in the branch, organization or allotment of a National Guard unit located entirely within a State may be made without the approval of that State's governor.

47. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredesen's approval, realign the 118th Airlift Wing.

48. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Third Claim for Relief

49. Plaintiff incorporates by reference and realleges paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Pursuant to 10 U.S.C. §18238, a unit of the Army National Guard or the Air National Guard of the United States may not be relocated or withdrawn without the consent of the governor of the State in which the National Guard is located.

51. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld may not, without first obtaining Governor Bredeesen's approval, realign the 118th Airlift Wing.

52. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredeesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

Fourth Claim for Relief

53. Plaintiff incorporates by reference and realleges paragraphs 1 through 52, inclusive, as though fully set forth herein.

54. Pursuant to 10 U.S.C. §18235(b)(1), the Secretary of Defense may not permit any use or disposition of a facility for a reserve component of the armed forces that would interfere with the facilities' use for administering and training the reserve components of the armed forces.

55. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's proposed realignment of the 118th Airlift Wing would result in interference with the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces and is barred by 10 U.S.C. §18235(b)(1).

56. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to

protect and enforce the use of the Nashville International Airport Air Guard Station for the training and administering of reserve components of the armed forces.

Fifth Claim for Relief

57. Plaintiff incorporates by reference and realleges paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Under the provisions of the United States Constitution, authority over the military is divided between the federal and state governments. U.S.C.A. Const. Art. 1, §8. The guarantee of the Second Amendment, regarding states' right to a well-regulated militia, was made for the purpose to assure the continuation and effectiveness of state militia. U.S.C.A. Const. Amend. II.

59. Pursuant to 28 U.S.C. §2201 and Fed.R.Civ.P. 57, plaintiff requests a Declaratory Judgment declaring that Secretary Rumsfeld's recommendation to realign the 118th Airlift Wing violates Art. 1, §8 and Amendment II of the United States Constitution by interfering with the maintenance and training of the Tennessee National Guard, without the approval of Governor Bredesen.

60. Pursuant to 28 U.S.C. §2202, plaintiff requests such further relief as necessary to protect and enforce Governor Bredesen's rights as governor of the State of Tennessee and as commander-in-chief of the Tennessee National Guard.

WHEREFORE, plaintiff prays that this honorable Court grant the following relief:

A. Enter a declaratory judgment declaring the realignment of the 118th Airlift Wing as proposed by defendant Rumsfeld without the consent of the Governor of the State of Tennessee is prohibited by federal law; and

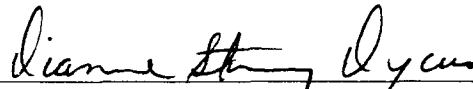
B. Grant such other relief as is warranted in the circumstances.

Respectfully submitted,



PAUL G. SUMMERS(6285)

Attorney General
State of Tennessee



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STATE OF TENNESSEE

PHIL BREDESEN
GOVERNOR

5 August 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
1155 Defense Pentagon
Arlington, VA 20301

Dear Secretary Rumsfeld:

I thank you for your outstanding service to our country as the Secretary of Defense, and for this opportunity to provide input on behalf of the citizens of the State of Tennessee. I am concerned about the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). I am also concerned with the errors and the methodology used by the Air Force to select the Nashville unit for realignment. See attached concerns.

As the Governor of the State of Tennessee, I do not consent to the realignment of the 118th AW in Nashville. I agree with the Governors of many other states, the National Guard Association of the United States, and the BRAC General Counsel concerning the significant legal issues with the Air National Guard BRAC recommendations. It is my opinion the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases.

In summary, the Volunteers of Tennessee stand ready to continue our long history of providing military men and women to defend our nation and way of life. The 118th Airlift Wing has outstanding facilities, a viable and relevant airlift mission, and this unit has answered the call of our nation for over 85 years. The current C-130 mission will remain in high demand for many years to come.

I respectfully ask for a careful examination of the military value, cost details, and legal concerns of the recommendation to realign the Nashville unit and move its aircraft to other Air National Guard locations. Commissioner Bilbray has seen first hand the military value of the base and strong support the surrounding area provides to the military.

Sincerely,



Phil Bredesen

Attachment: Concerns for Realignment of the 118th Airlift Wing

State Capitol, Nashville, Tennessee 37243-0001
(615) 741-2001

EXHIBIT A

The Honorable Donald H. Rumsfeld
5 August 2005
Page 2

cc: The Honorable Bill Frist
The Honorable Lamar Alexander
The Honorable William L. Jenkins
The Honorable John J. Duncan, Jr.
The Honorable Zack Wamp
The Honorable Lincoln Davis
The Honorable Jim Cooper
The Honorable Bart Gordon
The Honorable Marsha Blackburn
The Honorable John S. Tanner
The Honorable Harold E. Ford, Jr.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN

Below is a list of concerns that relate to the Air Force's recommendation to remove the C-130's from the Nashville 118th Airlift Wing (AW). This includes errors with Military Value data and flaws in the methodology used by the Air Force to select the Nashville unit for realignment:

1. The 118th AW military value score has several errors in Military Value data collection and calculation. For example, the "Installation Pavement Quality" of the Nashville runways received 0 (zero) points; however when properly calculated, the Nashville runways will receive the maximum of 5.98 points for this important item. Once corrected, this single item will substantially improve the Military Value ranking of the Nashville unit. This is only one example of the errors that have been formally submitted to the BRAC staff for correction of the Military Value score.
2. It appears the Air Force used the BRAC process to rebalance ANG Aircraft among the states, i.e., states with more ANG units should absorb more aircraft losses. If the number of ANG units in a state is a BRAC consideration, then the DOD should try to re-balance the number of active duty bases among the states, or the number of total military among the states, or the number of reserve members in each state. Tennessee ranks very low in each of the above comparisons and is under represented with military assets. When you compare active duty personnel numbers in Tennessee to those in other states, Tennessee is ranked number 41 in the nation, with only 2,700 active duty members. Also, on a Total Military (Active Duty and Reserve) Per Capita basis, Tennessee is ranked number 37 in the nation. So how do you justify moving a highly trained and combat seasoned Flying Wing out of Tennessee to other states with a larger military presence?
3. There are six C-130 ANG units with lower military value than Nashville that are keeping or gaining Aircraft. One of these lower military value locations will receive Nashville C-130's and will need \$4.3M of Military Construction (MILCON) to beddown the additional aircraft and would need \$34M of MILCON for this unit to robust to 16 C-130's. The Nashville unit previously operated 16 C-130's at this location for 14 years and stands ready to robust back to 12 or 16 aircraft at Zero Cost (As noted in the USAF BRAC data). Given the restrictions on MILCON funding and retraining cost, the realignment of the Nashville unit is not justified.
4. If the realignment occurs, many of the unit's combat experienced and well-trained aircrews and maintenance staff will leave the military, because these members will not be able to leave their hometown and move to another base. This will have a negative impact on the Homeland Defense and state emergency response mission. The C-130 is a "best fit" for the above missions and to support Military First Responders. In addition to providing combat airlift support during recent wars (including the Iraq War), the Nashville unit has provided support for forest fires, storm damage, drug interdiction, medical rescue operations, and other FEMA region support.
5. The 118th AW has very low cost and efficient facilities: the real property lease is one dollar until 2045; most of their facilities are less than 5 years old and in outstanding condition (in fact the 118th AW just received a Design Award from the Air Force for a \$24M Aircraft Hangar Complex); and use of four Nashville runways cost the federal government only \$36,000/year.

BRAC Concerns for Realignment of the 118th Airlift Wing, Nashville TN
Page 2

In summary, it appears the Air Force recommendation for the realignment of the Nashville unit and elimination of their flying Wing substantially deviate from the Congressional criteria used to evaluate military bases. These concerns have also been expressed by the Tennessee Air National Guards leadership during Commissioner Bilbray's June 05 visit, by members of our congressional delegation, by our Adjutant General, Gus Hargett, testimony to the Commission Regional Hearing in Atlanta, and others who have submitted formal input for the record.

**Office of General Counsel
Defense Base Closure and Realignment Commission**

Discussion of Legal and Policy Considerations Related to Certain Base Closure and Realignment Recommendations

**Dan Cowhig¹
Deputy General Counsel**

July 14, 2005

This memorandum describes legal and policy constraints on Defense Base Closure and Realignment Commission (Commission) action regarding certain base closure and realignment recommendations. This paper will not describe the limits explicit in the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act),² such as the final selection criteria,³ but rather will focus on other less

¹ Major, Judge Advocate General's Corps, U.S. Army. Major Cowhig is detailed to the Defense Base Closure and Realignment Commission under § 2902 of the Defense Base Closure and Realignment Act of 1990, as amended.

² Pub. L. No. 101-510, Div. B, Title XXIX, Part A, 104 Stat. 1808 (Nov. 5, 1990), as amended by Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. A, Title III, Part D, § 344(b)(1), 105 Stat. 1345; Act of Dec. 5, 1991, Pub. L. No. 102-190, Div. B, Title XXVIII, Part B, §§ 2821(a)-(h)(1), 2825, 2827(a)(1), (2), 105 Stat. 1546, 1549, 1551; Act of Oct. 23, 1992, Pub. L. No. 102-484, Div. A, Title X, Subtitle F, § 1054(b), Div. B, Title XXVIII, Subtitle B, §§ 2821(b), 2823, 106 Stat. 2502, 2607, 2608; Act of Nov. 30, 1993, Pub. L. No. 103-160, Div. B, Title XXIX, Subtitle A, §§ 2902(b), 2903(b), 2904(b), 2905(b), 2907(b), 2908(b), 2918(c), Subtitle B, §§ 2921(b), (c), 2923, 2926, 2930(a), 107 Stat. 1911, 1914, 1916, 1918, 1921, 1923, 1928, 1929, 1930, 1932, 1935; Act of Oct. 5, 1994, Pub. L. No. 103-337, Div. A, Title X, Subtitle G, §§ 1070(b)(15), 1070(d)(2), Div. B, Title XXVIII, Subtitle B, §§ 2811, 2812(b), 2813(c)(2), 2813(d)(2), 2813(e)(2), 108 Stat. 2857, 2858, 3053, 3055, 3056; Act of Oct. 25, 1994, Pub. L. No. 103-421, § 2(a)-(c), (f)(2), 108 Stat. 4346-4352, 4354; Act of Feb. 10, 1996, Pub. L. No. 104-106, Div. A, Title XV, §§ 1502(d), 1504(a)(9), 1505(e)(1), Div. B, Title XXVIII, Subtitle C, §§ 2831(b)(2), 2835-2837(a), 2838, 2839(b), 2840(b), 110 Stat. 508, 513, 514, 558, 560, 561, 564, 565; Act of Sept. 23, 1996, Pub. L. No. 104-201, Div. B, Title XXVIII, Subtitle B, §§ 2812(b), 2813(b), 110 Stat. 2789; Act of Nov. 18, 1997, Pub. L. No. 105-85, Div. A, Title X, Subtitle G, § 1073(d)(4)(B), (C), 111 Stat. 1905; Act of Oct. 5, 1999, Pub. L. No. 106-65, Div. A, Title X, Subtitle G, § 1067(10), Div. C, Title XXVIII, Subtitle C, §§ 2821(a), 2822, 113 Stat. 774, 853, 856; Act of Oct. 30, 2000, Pub. L. No. 106-398, § 1, 114 Stat. 1654; Act of Dec. 28, 2001, Pub. L. No. 107-107, Div. A, Title X, Subtitle E, § 1048(d)(2), Div. B, Title XXVIII, Subtitle C, § 2821(b), Title XXX, §§ 3001-3007, 115 Stat. 1227, 1312, 1342; Act of Dec. 2, 2002, Pub. L. No. 107-314, Div. A, Title X, Subtitle F, § 1062(f)(4), 1062(m)(1)-(3), Div. B, Title XXVIII, Subtitle B, § 2814(b), Subtitle D, § 2854, 116 Stat. 2651, 2652, 2710, 2728; Act of Nov. 24, 2003, Pub. L. No. 108-136, Div. A, Title VI, Subtitle E, § 655(b), Div. B, Title XXVIII, Subtitle A, § 2805(d)(2), Subtitle C, § 2821, 117 Stat. 1523,

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

obvious constraints on Commission action.⁴ This memorandum is not a product of deliberation by the commissioners and accordingly does not necessarily represent their views or those of the Commission.

This discussion uses Air Force Recommendation 33 (AF 33), Niagara Falls Air Reserve Station, NY,⁵ as an illustration. The text of AF 33 follows:

Close Niagara Falls Air Reserve Station (ARS), NY. Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA, the Expeditionary Combat Support (ECS) realigns to the 310th Space Group (AFR⁶) at Schriever Air Force Base, CO, and the Civil Engineering Squadron moves to Lackland Air Force Base, TX. Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG⁷) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft and no Air Force aircraft remain at Niagara.⁸

1721, 1726; and Act of Oct. 28, 2004, Pub. L. No. 108-375, Div. A, Title X, Subtitle I, § 1084(i), Div. B, Title XXVIII, Subtitle C, §§ 2831-2834, 118 Stat. 2064, 2132.

³ Base Closure Act § 2913.

⁴ Although the Commission has requested the views of the Department of Defense (DoD) on these matters, as of this writing DoD has refused to provide their analysis to the Commission. See Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (June 24, 2005) (with email request for information (RFI)) (Enclosure 1) and Letter from DoD OGC to Commission Deputy General Counsel Cowhig (July 5, 2005) (with email RFI) (Enclosure 2). These documents are available in the electronic library on the Commission website, www.brac.gov, filed as a clearinghouse question reply under document control number (DCN) 3686.

⁵ DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 2 OF 2: DETAILED RECOMMENDATIONS, Air Force 33 (May 13, 2005). This recommendation and the others cited in this paper are identified by the section and page number where they appear in the recommendations presented by the Secretary of Defense on May 13, 2005.

⁶ Air Force Reserve

⁷ Air National Guard

⁸ The justification, payback, and other segments of AF 33 read:

Justification: This recommendation distributes C-130 force structure to Little Rock (17-airlift), a base with higher military value. These transfers move C-130 force structure from the Air Force Reserve to the active duty — addressing a documented imbalance in the active/reserve manning mix for C-130s. Additionally, this recommendation distributes more capable KC-135R aircraft to Bangor (123), replacing the older, less

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

This recommendation, AF 33, includes elements common to many of the other Air Force recommendations that are of legal and policy concern to the Commission:

- the creation of a statutory requirement to base certain aircraft in specific locations;

capable KC-135E aircraft. Bangor supports the Northeast Tanker Task Force and the Atlantic air bridge.

Payback: The total estimated one-time cost to the Department of Defense to implement this recommendation is \$65.2M. The net of all costs and savings to the Department during the implementation period is a savings of \$5.3M. Annual recurring savings after implementation are \$20.1M, with a payback period expected in two years. The net present value of the cost and savings to the Department over 20 years is a savings of \$199.4M.

Economic Impact on Communities: Assuming no economic recovery, this recommendation could result in a maximum potential reduction of 1,072 jobs (642 direct jobs and 430 indirect jobs) over the 2006-2011 period in the Buffalo-Niagara Falls, NY, metropolitan statistical economic area, which is 0.2 percent of economic area employment. The aggregate economic impact of all recommended actions on this economic region of influence was considered and is at Appendix B of [DEPT. OF DEFENSE, BASE CLOSURE AND REALIGNMENT REPORT, VOL. I, PART 1 OF 2: RESULTS AND PROCESS].

Community Infrastructure Assessment: Review of community attributes indicates no issues regarding the ability of the infrastructure of the communities to support missions, forces, and personnel. There are no known community infrastructure impediments to implementation of all recommendations affecting the installations in this recommendation.

Environmental Impact: There are potential impacts to air quality; cultural, archeological, or tribal resources; land use constraints or sensitive resource areas; noise; threatened and endangered species or critical habitat; waste management; water resources; and wetlands that may need to be considered during the implementation of this recommendation. There are no anticipated impacts to dredging; or marine mammals, resources, or sanctuaries. Impacts of costs include \$0.3M in costs for environmental compliance and waste management. These costs were included in the payback calculation. There are no anticipated impacts to the costs of environmental restoration. The aggregate environmental impact of all recommended BRAC actions affecting the installations in this recommendation have been reviewed. There are no known environmental impediments to the implementation of this recommendation.

The payback figures are known to be incorrect, as they take the manpower costs associated with the 107th Air Refueling Wing, a unit of the New York Air Guard, as a savings despite the fact that the unit is expected to continue to exist at the same manpower levels as it does today. See GAO, MILITARY BASES: ANALYSIS OF DOD'S 2005 SELECTION PROCESS AND RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS (GAO-05-785) (July 1, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard⁹ unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

The legal and policy considerations related to Commission action on each of these elements are discussed below. While several of these issues are unique to the recommendations impacting units of the Air National Guard, several of the issues are also present in recommendations not involving the Air National Guard.

The Creation of a Statutory Requirement to Base Certain Aircraft in Specified Locations

In AF 33, the Air Force proposes to "distribute ... eight KC-135R aircraft ... to ... Bangor International Airport Air Guard Station," Maine. The eight tankers are currently based at Niagara Falls, New York. Many other Air Force recommendations also include language that would direct the relocation of individual aircraft to specific sites.

⁹ These units have a dual status. Although often referred to as units of the "Air National Guard" or "Army National Guard," these units are only part of the National Guard when they are called into Federal service. When serving in a state or territorial role, they form a part of the militia (or guard) of their own state or territory under the command of their own governors. When called into Federal service, the units form a part of the National Guard, a part of the Armed Forces of the United States under the command of the President.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, recommendations like those contained in AF 33 that mandate the placement of specific numbers of certain types of aircraft will place significant constraints on the future operations of the Air Force. In 1995, the previous Defense Base Closure and Realignment Commission found it necessary to remove similar mandatory language contained in recommendations approved in prior BRAC rounds. The restrictions on the placement of aircraft that were removed by the 1995 Commission were considerably less detailed than those currently recommended by the Air Force.¹⁰

The Base Closure Act contains no language that would explicitly limit the life-span of the statutory placement of the specified aircraft at the indicated sites.¹¹

Although the Base Closure Act combines elements of the national security powers of both Congress and the President, the end result of the process will be a statute. Assuming that the resulting statute is legally sound, it will require the concerted action of Congress and the President to relieve the Air Force of basing restrictions placed on specific aircraft by the statute. The deployment and direction of the armed forces, however, is principally the undivided responsibility of the President as Commander in Chief. Were operational circumstances to arise that required the redistribution of those aircraft, this conflict of authorities could delay or prevent appropriate action.¹²

Where an otherwise appropriate recommendation would require the Air Force to place certain aircraft in specific locations, the Commission should amend that recommendation to avoid the imposition of a statutory requirement to base certain aircraft

¹⁰ Faced with rapidly evolving capabilities, threats and missions, as well as a perceived budgetary shortfall, the Air Force would also suffer greater operational impediments from statutory directions on the basing of specific airframes today than under the conditions that prevailed in the early 1990s.

¹¹ Although an argument could be made that the language of section 2904(a)(5) requiring that the Secretary of Defense "complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments" might limit the life-span of such restrictions, the validity of this argument is questionable. Absent a later action by Congress or the President, or a future Commission, the changes effected by the Base Closure Act process are generally intended to be permanent.

¹² Although both § 2904(c)(2) of the Base Closure Act and 10 USC § 2687(c) permit the realignment or closure of a military installation regardless of the restrictions contained in each "if the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency," 10 USC § 2687(c), this language does not relieve the armed forces from the statutory provisions that result from the Base Closure Act process.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

at specific locations. This could be accomplished in some instances by amending the recommendation to identify the units or functions that are to be moved as a result of the closure or realignment of an installation, rather than identifying associated airframes. In instances where the recommendation would move aircraft without any associated units, functions or substantial infrastructure, the Commission should strike references to specific aircraft and locations, substituting instead an authority that would permit the Secretary of the Air Force to distribute the aircraft in accordance with the requirements of the service.¹³

¹³ For example, in AF 32, Cannon Air Force Base, NM, the Air Force recommends

Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's F-16s to the 115th Fighter Wing, Dane County Regional Airport, Truax Field Air Guard Station, WI (three aircraft); 114th Fighter Wing, Joe Foss Field Air Guard Station, SD (three aircraft); 150th Fighter Wing, Kirtland Air Force Base, NM (three aircraft); 113th Wing, Andrews Air Force Base, MD (nine aircraft); 57th Fighter Wing, Nellis Air Force Base, NV (seven aircraft), the 388th Wing at Hill Air Force Base, UT (six aircraft), and backup inventory (29 aircraft).

This recommendation would stand-down the active component 27th Fighter Wing and distribute the unit's aircraft to various other active and reserve component units as well as the Air Force backup inventory. The language of this recommendation does not call for the movement of any coherent unit. To bring this recommendation within the purpose of the Base Closure Act, it would be appropriate for the Commission to amend the recommendation to read "Close Cannon Air Force Base, NM. Distribute the 27th Fighter Wing's aircraft as directed by the Secretary of the Air Force, in accordance with law." Such an amendment would be appropriate under the Base Closure Act because the language directing the "distribution" of airframes independent of any personnel or function exceeds the authority granted to the Commission in the Base Closure Act and, depending upon the other issues involved in the particular recommendation, may otherwise violate existing law. See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act and to effect changes in how a unit is equipped or organized. Such an amendment would also have the benefit of preserving the Air Force Secretary's flexibility to react to future needs and missions. Further, if legal bars associated with aspects of recommendations impacting the Air National Guard are removed, for example, by obtaining the consent of the governor concerned, such an amendment could in some instances preserve the Air Force Secretary's access to Base Closure Act statutory authority and funding where the distributions are otherwise consistent with law. This could occur where the Secretary of the Air Force associates infrastructure changes with those distributions.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Effect Changes that do not Require the
Authority of the Act**

The authority of the Base Closure Act is required only where the Department closes "any military installation at which at least 300 civilian personnel are authorized to be employed,"¹⁴ or realigns a military installation resulting in "a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed" at that installation.¹⁵ The Department of Defense may carry out the closure or realignment of a military installation that falls below these thresholds at will.¹⁶

The Department of Defense does require the authority of the Base Closure Act to carry out the recommendation to "close Niagara Falls Air Reserve Station" because the station employs more than 300 civilian personnel. However, in AF 33, the Air Force would also direct the following actions:

Distribute ... eight C-130H aircraft ... to ... Little Rock Air Force
Base, AR. The 914th's headquarters moves to Langley Air Force Base,
VA

Also at Niagara, distribute ... eight KC-135R aircraft ... to ...
Bangor International Airport Air Guard Station, ME.
... retire ... eight KC-135E aircraft

The Department of Defense does not require the authority of the Act to move groups of eight aircraft,¹⁷ or retire groups of eight aircraft, or to move the headquarters of an Air Wing without associated infrastructure changes. Many other Air Force recommendations include similar language directing the movement or retirement of small

¹⁴ 10 USC § 2687(a)(2).

¹⁵ 10 USC § 2687(a)(3).

¹⁶ By definition, the Base Closure Act does not apply to "closures and realignments to which section 2687 of Title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section." Base Closure Act § 2909(c)(2).

¹⁷ Nor does the Base Closure Act grant the Department of Defense the authority to retire an aircraft where that retirement is prohibited by law. See the discussion regarding the retirement of aircraft whose retirement has been barred by statute, page 15.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

numbers of aircraft, often without moving the associated personnel.¹⁸ Several of the Air Force recommendations do not contain a single element that would require the authority of the Base Closure Act.¹⁹

The time and resource intensive process required by the Base Closure Act is not necessary to implement these actions. Except for the actions that are otherwise barred by law,²⁰ the Air Force could carry out these actions on its own existing authority. By including these actions in the Base Closure Act process, critical resources, including the very limited time afforded to the Commission to its review of the recommendations of the Secretary of Defense, are diverted from actions that do require the authorization of the process set out under the Base Closure Act. Perhaps more significantly, if these actions are approved by the Commission, the legal authority of the Base Closure Act would be thrown behind these actions, with the likely effect of overriding most if not all existing legal restrictions.

The inclusion of actions that conflict with existing legal authority will endanger the entirety of the base closure and realignment recommendations by exposing the recommendations to rejection by the President or Congress or to a successful legal challenge in the courts.²¹

¹⁸ For example, AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky, without moving the associated personnel.

¹⁹ For example, AF 34, Schenectady County Airport Air Guard Station, NY, calls for the movement of four C-130 aircraft from Schenectady, New York, to Little Rock, Arkansas, with a potential direct loss of 19 jobs and no associated base infrastructure changes; AF 38, Hector International Airport Air Guard Station, ND, calls for the retirement of 15 F-16s with no job losses and no associated base infrastructure changes, and; AF 45, Ellington Air Guard Station, TX, calls for the retirement of 15 F-16s with an estimated total loss of five jobs and no associated base infrastructure changes.

²⁰ See in particular the discussions of the use of the Base Closure Act to effect changes in how a unit is equipped or organized, page 9; the relocation, withdrawal, disbandment or change in the organization of an Air National Guard unit, page 11, and; the retirement of aircraft whose retirement has been barred by statute, page 15.

²¹ Although Congressional Research Service recently concluded it is unlikely that a legal challenge to the actions of the Commission would prevail, CRS assumed that the Commission's recommendations would be limited to the closure or realignment of installations. The Availability of Judicial Review Regarding Military Base Closures and Realignments, CRS Order Code RL32963, Watson, Ryan J. (June 24, 2005). See the discussion of the use of the Base Closure Act to effect changes in how a unit is equipped, organized, or deployed, page 9.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

In order to protect the Base Closure Act process, where a recommendation to close or realign an installation falls below the threshold set by Section 2687 of Title 10, United States Code, but does not otherwise conflict with existing legal restrictions, it would be appropriate for the Commission to consider even a minor deviation from the force-structure report or the final selection criteria to be a substantial deviation under the meaning of the Base Closure Act. Where a recommendation to close or realign an installation falls below the threshold set by Section 2687 and conflicts with existing legal restrictions, the Commission must act to remove that recommendation from the list.²²

The Use of the Base Closure Act to Effect Changes in How a Unit is Equipped or Organized

In AF 33, the Air Force would direct the following actions:

Distribute the eight C-130H aircraft of the 914th Airlift Wing (AFR) to the 314th Airlift Wing, Little Rock Air Force Base, AR. The 914th's headquarters moves to Langley Air Force Base, VA

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME. The 101st will subsequently retire its eight KC-135E aircraft

In the purpose section of AF 33, the Air Force explains "these transfers move C-130 force structure from the Air Force Reserve to the active duty — *addressing a documented imbalance in the active/reserve manning mix for C-130s.*"²³ Many other Air Force recommendations include similar language directing the reorganization of flying units into Expeditionary Combat Support units,²⁴ the transfer or retirement of specific

²² See the discussions of the use of the Base Closure Act to effect changes that do not require the authority of the Act, page 7, to effect changes in how a unit is equipped or organized, page 9, to relocate, withdraw, disband or change the organization of an Air National Guard unit, page 11, to retire aircraft whose retirement has been barred by statute, page 15, and to transfer aircraft from a unit of the Air Guard of one state or territory to that of another, page 17.

²³ Emphasis added.

²⁴ See, for example, AF 28, Key Field Air Guard Station, MS, recommending in effect that the 186th Air Refueling Wing of the Mississippi Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 30, Great Falls International Airport Air Guard Station, MT, recommending in

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

aircraft without movement of the associated personnel,²⁵ or the movement of headquarters without the associated units.

The purpose of the Base Closure Act "is to provide a fair process that will result in the timely closure and realignment of *military installations* inside the United States."²⁶ Under the Base Closure Act, "the term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility."²⁷ The purpose of the Act is to close or realign excess real estate and improvements that create an unnecessary drain on the resources of the Department of Defense. The Base Closure Act is not a vehicle to effect changes in how a unit is equipped or organized.

Under the Base Closure Act, "the term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions *but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.*"²⁸ A "realignment," under the Base Closure Act, pertains to installations, not to units or to equipment.

The Base Closure Act does not grant the Commission the authority to change how a unit is equipped or organized. Recommendations that serve primarily to transfer aircraft from one unit to another, to retire aircraft, or to address an imbalance in the active-reserve force mix²⁹ are outside the authority granted by the Act. The Commission must act to remove such provisions from its recommendations.

effect that the 120th Fighter Wing of the Montana Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit; AF 38, Hector International Airport Air Guard Station, ND, recommending in effect that the 119th Fighter Wing of the North Dakota Air Guard be reorganized and redesignated as an Expeditionary Combat Support (ECS) unit.

²⁵ See notes 18 and 19 above.

²⁶ Base Closure Act § 2901(b) (emphasis added).

²⁷ Base Closure Act § 2910(4). This definition is identical to that codified at 10 USC § 2687(e)(1).

²⁸ Base Closure Act, §2910(5) (emphasis added). This definition is identical to that codified at 10 USC § 2687(e)(3).

²⁹ For example, AF 39, Mansfield-Lahm Municipal Airport Air Guard Station, OH, "*addressing a documented imbalance in the active/Air National Guard/Air Force Reserve manning mix for C-130s*" by closing "Mansfield-Lahm Municipal Airport Air Guard Station (AGS), OH," distributing "the eight C-130H aircraft of the 179th Airlift Wing (ANG) to the 908th Airlift Wing (AFR), Maxwell Air Force Base, AL (four aircraft), and the 314th Airlift Wing, Little Rock Air Force Base, AR (four aircraft)." Emphasis added.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

**The Use of the Base Closure Act to Relocate, Withdraw, Disband or Change the
Organization of an Air National Guard Unit**

In AF 33, the Air Force proposes to "distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station," Maine. Under the recommendation, "no Air Force aircraft remain at Niagara." The recommendation is silent as to the disposition of the 107th Air Refueling Wing of the New York Air Guard. The recommendation would either disband the 107th, or change its organization from that of a flying unit to a ground unit.³⁰

Many other Air Force recommendations would have similar effects, relocating, withdrawing, disbanding or changing the organization of Air National Guard units. In most instances, where the Air Force recommends that an Air Guard flying unit be stripped of its aircraft, the Air Force explicitly provides that the unit assume an expeditionary combat support (ECS) role. For example, in AF 28, Key Field Air Guard Station, MS, the Air Force would

Realign Key Field Air Guard Station, MS. Distribute the 186th Air Refueling Wing's KC-135R aircraft to the 128th Air Refueling Wing (ANG), General Mitchell Air Guard Station, WI (three aircraft); the 134th Air Refueling Wing (ANG), McGhee-Tyson Airport Air Guard Station, TN (three aircraft); and 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME (two aircraft). One aircraft will revert to backup aircraft inventory. The 186th Air Refueling Wing's fire fighter positions move to the 172^d Air Wing at Jackson International Airport, MS, and the expeditionary combat support (ECS) will remain in place.

Similarly, in DoN³¹ 21, Recommendation for Closure and Realignment Naval Air Station Joint Reserve Base Willow Grove, PA, and Cambria Regional Airport,

³⁰ If the intention is to disband the unit, additional legal issues are present. The end-strength of the Air National Guard is set by Congress. Eliminating a refueling wing would alter the end-strength of the Air National Guard.

³¹ Department of the Navy

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Johnstown, PA, the Navy proposes to "close Naval Air Station Joint Reserve Base Willow Grove ... deactivate the 111th Fighter Wing (Air National Guard)." In AF 38, Hector International Airport Air Guard Station, ND, the Air Force recommends that the Commission "realign Hector International Airport Air Guard Station, ND. The 119th Fighter Wing's F-16s (15 aircraft) retire. The wing's expeditionary combat support elements remain in place." As justification, the Air Force indicates "the reduction in F-16 force structure and the need to align common versions of the F-16 at the same bases argued for realigning Hector to allow its aircraft to retire *without a flying mission backfill*."³²

Clearly, these and similar recommendations contemplate an action whose direct or practical effect will be a change in the organization, or a withdrawal, or a disbandment of an Air National Guard unit. There are specific statutory provisions that limit the authority of any single element of the Federal Government to carry out such actions.

By statute, "each State or Territory and Puerto Rico may fix the location of the units ... of its National Guard."³³ This authority of the Commander in Chief of a state or territorial militia is not shared with any element of the Federal Government. Although the President, as the Commander in Chief of the Armed Forces of the United States, "may designate the units of the National Guard ... to be maintained in each State and Territory" in order "to secure a force the units of which when combined will form complete higher tactical units ... no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor."³⁴ The clear intent of these statutes and other related provisions in Title 32, United States Code is to recognize the dual nature of the units of the National Guard, and to ensure that the rights and responsibilities of both sovereigns, the state and the Federal governments, are protected. According to the Department of Defense, no governor has consented to any of the recommended Air National Guard actions.³⁵

Several rationales might be offered to avoid giving effect to these statutes in the context of an action by the Commission. It could be argued that since the

³² Emphasis added.

³³ 32 USC § 104(a).

³⁴ 32 USC § 104(c).

³⁵ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 ("The Air Force has not received consent to the proposed realignments or closures from any Governors concerning realignment or closure of Air National Guard installations in their respective states.") (June 16, 2005) (Enclosure 3).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

recommendations of the Commission, if forwarded by the President to Congress, and if permitted by Congress to pass into law, would themselves become a statute, the recommendations would supersede these earlier statutory limitations. This argument could be bolstered by the fact that later statutes are explicitly considered to supersede many provisions of Title 32, United States Code.³⁶ It could also be argued that since the Commission would merely recommend, but does not itself decide or direct a change in the organization, withdrawal, or disbandment, no action by the Commission could violate these statutes.³⁷ Each of these lines of reasoning would require the Commission to ignore the inherent authority of the chief executive of a state to command the militia of the state and the unique, dual nature of the National Guard as a service that responds to both state and Federal authority.

A related provision of Title 10, United States Code reflects "a unit of ... the Air National Guard of the United States may not be relocated or withdrawn under this chapter³⁸ without the consent of the governor of the State or, in the case of the District of Columbia, the commanding general of the National Guard of the District of Columbia."³⁹ It could be argued that this provision is limited by its language to the chapter in which it is found, Chapter 1803, Facilities for Reserve Components. That chapter does not include the codified provisions related to base closures and realignments, Section 2687,⁴⁰ which is located in Chapter 159, Real Property, much less the session law that comprises the Base Closure Act. Such an argument, however, would ignore the fact that the Base Closure Act implements the provisions of Section 2687, and that Chapter 1803, Facilities for Reserve Components, applies the general statutory provisions related to the real property and facilities of the Department of Defense found in Chapter 159, Real Property, to the particular circumstances of the Reserve Components.

The Commission must also consider the Title 32, United States Code limitation that "unless the President consents ... an organization of the National Guard whose

³⁶ Section 34(a) of Act Sept. 2, 1958, Pub. L. No. 85-861, 72 Stat. 1568, which recodified the statutory provisions relating to the National Guard as Title 32, provided that "laws effective after December 31, 1957 that are inconsistent with this Act shall be considered as superseding it to the extent of the inconsistency."

³⁷ It might even be asserted that the responsibility and authority of the Commission is limited to verifying that the recommendations of the Department of Defense are consistent with the criteria set out in the Base Closure Act, so that the Commission has no responsibility or authority to ensure that the recommendations comport with other legal restrictions. Such an argument would ignore the obligation of every agent of the Government to ensure that he or she acts in accordance with the law.

³⁸ Chapter 1803, Facilities for Reserve Components, 10 USC §§ 18231 *et seq.*

³⁹ 10 USC § 18238.

⁴⁰ 10 USC § 2687.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

members have received compensation from the United States as members of the National Guard may not be disbanded."⁴¹ While it could be argued that if the President were to forward to Congress a report from the Commission that contained a recommendation that would effectively disband an "organization of the National Guard whose members have received compensation from the United States as members of the National Guard," the consent of the President could be implied, such an argument is problematic. Implied consent requires an unencumbered choice. Under the mechanism established by the Base Closure Act, the President would be required to weigh the detrimental effects of setting aside the sum total of the base closure and realignment recommendations against acceding to the disbanding of a small number of National Guard organizations. Under those circumstances, consent could not reasonably be implied. What is more, it would be at best inappropriate to allow the President to be placed in such a position by allowing a rider among the Commission's recommendations whose effect would be to disband a guard unit covered by that section of Title 32.

Withdrawing, disbanding, or changing the organization of the Air National Guard units as recommended by the Air Force would be an undertaking unrelated to the purpose of the Base Closure Act. It would require the Commission to alter core defense policies. A statute drawn from the text of the National Defense Act of 1916 proclaims that "in accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times."⁴² This traditional military policy was given new vigor in the aftermath of the Vietnam War with the promulgation of what is generally referred to today as the Abrams Doctrine. A host of interrelated actions by Congress, the President, the states and the courts have determined the current strength and organization of the National Guard. While the Base Closure Act process is an appropriate vehicle to implement base closures and realignments that become necessary as a result of changes to the strength and organization of the National Guard, the Base Closure Act process is not an appropriate vehicle to make those policy changes.

Any discussion of these statutory provisions must take into account the underlying Constitutional issues. These statutes not only flesh out the exercise of the powers granted to the Legislative and Executive branches of Federal Government,⁴³ they

⁴¹ 32 USC § 104(f)(1).

⁴² 32 USC § 102.

⁴³ See *Perpich v. Department of Defense*, 496 U.S. 334 (1990); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (*Steel Seizures*).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

also express a long-standing compromise with the prerogatives of the governors, as chief executives of the states, that antedate the ratification of the Constitution.⁴⁴ Any argument that would propose to sidestep these statutes should be evaluated with the knowledge that the statutes are expressions of core Constitutional law and national policy.

Where the practical result of an Air Force recommendation would be to withdraw, disband, or change the organization of an Air National Guard unit, the Commission may not approve such a recommendation without the consent of the governor concerned and, where the unit is an organization of the National Guard whose members have received compensation from the United States as members of the National Guard, of the President.⁴⁵

The Use of the Base Closure Act to Retire Aircraft whose Retirement Has Been Barred by Statute

In AF 33, the Air Force recommends that the 101st Air Refueling Wing of the Maine Air Guard "retire its eight KC-135E aircraft." As discussed above, the

⁴⁴ See Steel Seizures; W. Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The statutory protection of the ancient privileges and organization of various militia units is also an expression of the "natural law of war." See note 45, below.

⁴⁵ Another potential inhibiting factor is that certain militia units enjoy a statutory right to retention of their ancient privileges and organization:

Any corps of artillery, cavalry, or infantry existing in any of the States on the passage of the Act of May 8, 1792, which by the laws, customs, or usages of those States has been in continuous existence since the passage of that Act [May 8, 1792], shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That those organizations may be a part of the National Guard and entitled to all the privileges thereof, and shall conform in all respects to the organization, discipline, and training to the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Section 32(a) of Act of August 10, 1956, Ch. 1041, 70A Stat. 633. Although this statute has relevance only to the militia of the 13 original states, and perhaps to the militia of Vermont, Maine and West Virginia, neither the Department of Defense nor the Commission has engaged in the research necessary to determine whether any of the units impacted by these recommendations enjoys this protection.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Department of Defense does not require the authority of the Base Closure Act to retire aircraft. Similarly, the Base Closure Act does not grant the Commission the authority to retire aircraft.

It is well-settled law that Congress' power under the Constitution to equip the armed forces includes the authority to place limitations on the disposal of that equipment. For a variety of reasons, Congress has exercised that authority extensively in recent years with regard to two aircraft types that are prominent in the Air Force recommendations to retire aircraft.

The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2004 prohibited the Secretary of the Air Force from retiring more than 12 KC-135E during FY 2004.⁴⁶ Under the Ronald W. Reagan NDAA for FY 2005, "the Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2005."⁴⁷ It appears likely that NDAA 2006 will contain provisions prohibiting the retirement of not only KC-135E, but also C-130E and C-130H.⁴⁸

Assuming that the final recommendations of the Commission to the President proceed through the entire process set forth by the Base Closure Act to become a statute, any recommendations that mandate the retirement of specific numbers of certain types of aircraft will also have statutory authority. Whether the direction to retire those aircraft contained in the statute resulting from the Base Closure Act recommendations or the prohibition against retiring those aircraft contained in the National Defense Authorization Act would control is a matter of debate.⁴⁹ Nonetheless, since the Base Closure Act does not grant the Commission the authority to retire aircraft, and the Department of Defense does not require the authority of the Base Closure Act to retire aircraft in the absence of a statutory prohibition, the Commission should ensure that all references to retiring certain

⁴⁶ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Title I, Subtitle D, § 134, 117 Stat. 1392 (Nov. 23, 2003).

⁴⁷ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Title I, Subtitle D, § 131, 118 Stat. 1811 (Oct. 28, 2004).

⁴⁸ See Senate 1043, 109th Cong., A Bill to Authorize Appropriations for Fiscal Year 2006 for Military Activities of the Department of Defense, Title I, Subtitle D, § 132 ("The Secretary of the Air Force may not retire any KC-135E aircraft of the Air Force in fiscal year 2006") and § 135 ("The Secretary of the Air Force may not retire any C-130E/H tactical airlift aircraft of the Air Force in fiscal year 2006.") (May 17, 2005).

⁴⁹ See Congressional Research Service Memorandum, Base Realignment and Closure of National Guard Facilities: Application of 10 USC § 18238 and 32 USC § 104(c), Flynn, Aaron M. (July 6, 2005).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

types of aircraft are deleted from the Commission's recommendations in order to avoid a potential conflict of laws.

The Use of the Base Closure Act to Transfer Aircraft from a Unit of the Air Guard of One State or Territory to that of Another

In AF 33, the Air Force recommends:

Also at Niagara, distribute the eight KC-135R aircraft of the 107th Air Refueling Wing (ANG) to the 101st Air Refueling Wing (ANG), Bangor International Airport Air Guard Station, ME.

This recommendation would effectively transfer the entire complement of aircraft from a unit of the New York Air Guard, the 107th Air Refueling Wing, to a unit of the Maine Air Guard, the 101st Air Refueling Wing. Many other Air Force recommendations include similar language directing the transfer of aircraft from the Air Guard of one state or territory to that of another.⁵⁰

The effect of such a recommendation would be to combine the issues raised by a change in the organization, withdrawal, or disbandment of an Air National Guard unit with those raised by the use of the Base Closure Act to effect changes in how a unit is equipped or organized, and those raised by use of the Act to effect changes in how a unit is equipped or organized. The legal impediments and policy concerns of each issue are compounded, not reduced, by their combination.

Further, Congress alone is granted the authority by the Constitution to equip the Armed Forces of the United States. Congress did not delegate this power to the Commission through the language of the Base Closure Act. Where Congress has authorized the purchase of certain aircraft with the express purpose of equipping the Air

⁵⁰ See, for example, AF 34, Schenectady County Airport Air Guard Station, NY, recommends that the 109th Airlift Wing of the New York Air Guard "transfer four C-130H aircraft" to the 189th Airlift Wing of the Arkansas Air Guard, and; AF 44, Nashville International Airport Air Guard Station, TN, calls for the movement of four C-130Hs from Nashville, Tennessee to Peoria, Illinois, and four C-130Hs to Louisville, Kentucky.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

Guard of a particular state or territory,⁵¹ the Commission may not approve any recommendation action that would contravene the intent of Congress.

Conclusion and Recommendation

Each of the areas of concern discussed above

- the creation of a statutory requirement to base certain aircraft in specific locations;
- the use of the Base Closure Act to effect changes that do not require the authority of the Act;
- the use of the Base Closure Act to effect changes in how a unit is equipped or organized;
- the use of the Base Closure Act to relocate, withdraw, disband or change the organization of an Air National Guard unit;
- the use of the Base Closure Act to retire aircraft whose retirement has been barred by statute, and;
- the use of the Base Closure Act to transfer aircraft from a unit of the Air Guard of one state or territory to that of another

presents a significant policy concern or an outright legal bar. These policy concerns and legal bars coincide in most instances with a substantial deviation from the force-structure report or the final selection criteria set out in the Base Closure Act.⁵²

⁵¹ Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005) (Enclosure 4).

⁵² The final selection criteria are:

- (a) Final selection criteria. The final criteria to be used by the Secretary in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 shall be the military value and other criteria specified in subsections (b) and (c).

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

The Commission should analyze each recommendation for the presence of these issues. Where the Commission finds significant policy issues, it should examine the recommendation concerned to determine whether the recommendation is consistent with

(b) Military value criteria. The military value criteria are as follows:

(1) The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.

(2) The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.

(3) The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.

(4) The cost of operations and the manpower implications.

(c) Other criteria. The other criteria that the Secretary shall use in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005 are as follows:

(1) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

(2) The economic impact on existing communities in the vicinity of military installations.

(3) The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.

(4) The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.

(d) Priority given to military value. The Secretary shall give priority consideration to the military value criteria specified in subsection (b) in the making of recommendations for the closure or realignment of military installations.

(e) Effect on Department and other agency costs. The selection criteria relating to the cost savings or return on investment from the proposed closure or realignment of military installations shall take into account the effect of the proposed closure or realignment on the costs of any other activity of the Department of Defense or any other Federal agency that may be required to assume responsibility for activities at the military installations.

(f) Relation to other materials. The final selection criteria specified in this section shall be the only criteria to be used, along with the force-structure plan and infrastructure inventory referred to in section 2912, in making recommendations for the closure or realignment of military installations inside the United States under this part in 2005.

Base Closure Act, § 2913.

Office of General Counsel
Defense Base Closure and Realignment Commission
Discussion of Legal and Policy Considerations Related to Certain Base Closure and
Realignment Recommendations

the force-structure plan and the final selection criteria, or whether there is a substantial deviation from the force-structure plan or the final selection criteria.

Where the Commission finds substantial deviation or a legal bar, it must act to amend the recommendation, where possible, to correct the substantial deviation or overcome the legal bar. Where amendment to correct the substantial deviation or overcome the legal bar is not possible, the Commission must act to strike the recommendation from the list.

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4 Enclosures

1. Letter from DoD Office of General Counsel (OGC) to Commission Chairman Principi (with email request for information (RFI)) (June 24, 2005).
2. Letter from DoD OGC to Commission Deputy General Counsel Cowhig (with email RFI) (July 5, 2005).
3. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response re: BI-0068 (June 16, 2005).
4. Memorandum, Office of the Chief of Staff of the Air Force, Base Realignment and Closure Division, subject: Inquiry Response, re: BI-0099 - ANG aircraft acquired through congressional add (June 30, 2005).

